United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-2028

UNITED STATES ex rel. HAROLD KONIGSBERG,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility,

Respondent-Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITIONER-APPELLANT'S REPLY BRIEF

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POINT I

The State's brief misses the thrust of petitioner's main argument in connection with the claim that the record does not fairly support the finding that he was competent to waive counsel and did in fact validly waive that right.

We have for the purposes of this appeal conceded that the state hearing was sufficient to support

a finding that he was competent to stand trial. But that he was otherwise mentally ill, seriously disturbed psychiatrically, does not appear to be in dispute. (See references at the end of first full paragraph at page 14 of main brief).

Given a defendant, concededly competent to stand trial, but obviously otherwise disturbed mentally and emotionally, does the record support the finding that the state court took steps to carefully advise and counsel him as to the risks of proceeding pro se so as to increase the possibility he would make a sensible judgment? The answer is so very clear that not only does the record fail to reflect a careful examination of the circumstances of the pro se request but of more importance the record shows the trial court went out of its way unfairly to impair petitioner's judgment still further. That was accomplished by the repeated misleading comments to Petitioner and to Lopez that petitioner could be assured that even if convicted he would not get the "book thrown at him" (See the page references in the first two paragraphs of page 19 of main brief) and that petitioner

was "brilliant", as competent as any lawyer the court had seen (Ibid). (FHT p. 73)

Even if petitioner were not disturbed, even if he were a normal functioning individual, such conduct on the part of the state court served to impair the capacity to make a rational judgment by misleading him as to the "worst of the consequences" and by making it less likely that he would turn his defense over to counsel. Lopez testified that after these remarks of the Trial Judge petitioner became unmanageable.

The opposing brief points out that Lopez had advised petitioner of the added risks by reason of predicate felonies (see their brief, page 16) but that citation entirely misses the critical point that this took place only after the alleged waiver and that it was obvious petitioner was unaware of the proper rule before the waiver. (FHT p. 71) And, it must be noted by this time, from the compliments petitioner had earlier received from the judge, he was according to Lopez, unwilling to take advice from counsel (FHT p. 66-73). This served to impair still further his ability to make any rational decisions. (FHT 29ff) None of this was touched on by Judge Tyler. The Court

believed that the petitioner was prison-wise enough to know the risks. But the record shows, according to Lopez's testimony, petitioner was not aware of the added risks by reason of his prior out of state convictions and the District Judge erroneously failed to give attention to the affect on the petitioner's possible exercise of a rational judgment in light of the misleading comments of the trial judge to the effect that he need not worry about getting the kind of sentence that would keep him from his family forever and further, that he was brilliant.

It must be the law that when confronted with a mentally disturbed defendant whose ability to make rational decisions is seriously questioned by federal examining and treating doctors a state judge is constitutionally required to exercise extreme caution as opposed to deception. Yet the Court acted in such a way as to falsely allay petitioner's fears and to boost improperly his ego knowing the inevitable affect this would have on the willingness of petitioner to thereafter take or accept counsel from anyone.

And while we are on the point of the way the trial progressed, it is absolutely unfair to this Court for the state to characterize petitioner's conduct of his trial as

done in an "intelligent manner". It of course was not. This is not to say petitioner is entitled to relief because he bungled his defense. But it is simply untrue to say his defense was "brilliant" or he was as competent as any lawyer or his defense was handled in an "intelligent manner". Near the end of the trial the court pointed out, though too late, to petitioner how he had disadvantaged himself by a pro-se defense. See trial transcript, pages 3294-96. As to the way he conducted the defense it must be remembered he abandoned the most sensible of defenses under the circumstances, insanity, though his lawyer before the discharge had opened to the jury on the basis of this as the defense. (See pages 16-17 of main brief and pages 28-29 of the state brief for page references clearly showing the quality of the defense).

What is of critical concern in the proper disposition of the point of intelligent waiver is whether an evidentiary hearing held as it was more than seven years after the alleged waiver could in any sense be "meaningful". Our brief cited the Supreme Court decisions in Drope v. Missouri, 420 US 162 (1975) and in Dusky v. U.S., 362 US 402 (1960). The state simply chose to ignore the issue.

The hearing saw the state produce a doctor who had examined petitioner for only an hour on the sole issue of competency to stand trial with no inquiry by him into any legal matters. (See Second Sanity Hearings, page 1477) And, then the trial judge was called. To be sure, no state appointed doctor ever opined that petitioner understood the extent of the penalties he faced on conviction. The federal doctors pre-trial, did believe he did not comprehend in some "realistic measure the kind of trouble he could get into were he to be found guilty". See pages 13-14 of main brief for references to record. It is contended that as matter of law such understanding was required as a condition to an intelligent waiver. (See main brief, page 45-46 where the matter is discussed after reference to Judge Tyler's views on the subject).

As recently as July 2, 1975 Mr. Justice Stewart for the Supreme Court in Faretta v. California, U.S. 95 S.Ct. 2525 wrote:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'.

Adams v. United States ex rel. McCann, 317 U.S. 269, 270.

> Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure".

The record here does not support any finding that the state court affirmatively took the steps required to discharge its constitutional duty to petitioner.

The state's theory of proof was that petitioner simply must have known what he was doing. (See their brief, page 25). This however was not a "meaningful," a "searching", a "penetrating" inquiry or way of determining whether he in fact had the requisite capacity and intelligence, recognizing we are dealing with a forty four year sentence which was imposed consecutively to a ten year federal sentence.

The seven year delay and the scant proof available and presented by the state to support the waiver made the federal hearing significantly less than meaningful. Given the problem of such delay a new trial should have been

ordered. See U.S. v. David, 511 F2d 355 (DC Cir. 1975).

POINT II

The state brief also misses the mark in response to the point dealing with prejudicial publicity. There is no claim that the case received press attention comparable to Dr. Sheppard's case. What is however contended is that in light of the clear representation that newspapers containing prejudicial articles were seen in the jury room, the court was required in light of repeated defense requests, in order to protect the right to a fair trial, to poll the unsequestered jury. See U.S. v. Pomponio, 517 F.2d 460 (4th Cir. 1975)

Further, in the face of numerous articles, and of an interview reported by the press with the judge and prosecutor it was manifest error to take the position as the trial court did that he lacked the power to control or influence the press (see our brief, page 23). The Court was not so impotent (Sheppard v. Maxwell, 383 U.S. at 357-8) and particularly so when it came to restricting interviews participated in by it and the prosecutor (see references at p. 49 of our brief).

(The articles submitted to Judge Tyler were not

transmitted by him to the District Court Clerk. Consequently, I will hand up a copy of the articles, with the consent of the state, on oral argument. They can not legibly be reproduced in sufficient number so that I was unable to file a supplemental record).

POINT III

There was no indication that Judge Tyler read or considered the state trial transcript. After a reference to Magistrate Schrieber the magistrate's report was approved, with one exception, after considering only the "Report and the papers and briefs of the parties." This delegation to the magistrate was improper (see our brief, p. 5 & 20). The state did not respond to this.

CONCLUSION

For the reasons spelled out in the main brief the relief prayed for should have been granted and the order below must be reversed.

Respectfully submitted:

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September 9th, 1975

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Reply Brief

IS HEREBY ADMITTED.

DATED:

Attorney for